

Editor's Note: appeal filed, Civ. No. 98-311 (E.D. KY, London Div.) 1998.

APPOLO FUELS, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 98-62

Decided May 28, 1998

Appeal from a Decision of Administrative Law Judge David L. Torbett sustaining Notice of Violation No. 94-081-416-003 and Cessation Order No. 94-081-416-002.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977:
Backfilling and Grading Requirements: Highwall
Elimination

An NOV and CO issued by OSM in the exercise of Federal oversight authority were properly affirmed based on findings that settlement of backfill inside the permit area of a Kentucky surface coal mining operation resulted in highwalls, scarps, and fissures in violation of State law and contrary to SMCRA section 515.

APPEARANCES: James R. Golden, Esq. Middlesboro, Kentucky, for Appolo Fuels, Inc.; John Austin, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Appolo Fuels, Inc. (Appolo) has appealed from an October 29, 1997, Decision of Administrative Law Judge David L. Torbett that sustained issuance of Notice of Violation (NOV) No. 94-081-416-003 and Cessation Order (CO) No. 94-081-416-002, as amended, to Appolo by the Office of Surface Mining Reclamation and Enforcement (OSM). The NOV alleging that Appolo failed to return Permit No. 407-0066 to approximate original contour (AOC) and eliminate all highwalls, as required by State and Federal regulations implementing section 515 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), was issued on September 1, 1994; the CO, issued on October 1, 1994, required Appolo to backfill and grade the permit to eliminate exposed highwalls. As later amended, the NOV requires submission within 30 days of "a plan for the stabilization of the areas of instability

where scarps and pressure bulges have developed in the backfill." Any plan proposed must include "elimination of all exposed highwall with a resulting backfill whose long-term static factor of safety is at least 1.3." Appolo sought temporary relief from the CO and a hearing, following which the Decision now before us was issued sustaining the amended NOV and CO. A timely appeal was taken from Judge Torbett's Decision sustaining the NOV and CO; we affirm his Decision.

Testimony given at the hearing before Judge Torbett held on April 25, 1995, established that highwalls up to 15 feet in height, scarps, and fissures remained on the Appolo permit after reclamation of the site. (SOR at 42; Tr. at 41-60, 91-97, 99-103, 250); Adopted Finding LL, Judge Torbett's Decision. "Scarps" were defined variously by witnesses at the hearing, but it was agreed the term describes abrupt changes in slope. See, e.g., Tr. 240. Witnesses for OSM and Appolo disagreed about how those features should be characterized, OSM's employees choosing to describe them as indicators of long term instability in the fill when watered (Tr. 81, 92-94, 147), while Appolo witnesses saw them as artifacts of stress induced by settling of the fill; the latter view was supported by reference to the fact that there had as yet been no landslides in the filled areas. (Tr. 201-202, 219, 241, 276.)

Appolo raises a principal contention on appeal that OSM issued the NOV in error because highwalls left on the permit were properly reclaimed but reappeared after the covering fill settled. Pursuing this theory it is alleged that there is no regulatory requirement that the permit be maintained free of highwalls, once they are all eliminated. Recognizing that this argument runs counter to the holding in River Processing, Inc. v. OSM, 76 IBLA 129 (1983), Appolo urges the cited case was decided in error and should be overruled. In a number of subsidiary arguments, it is said that OSM lacked authority to issue the NOV, that OSM's issuance of the NOV is barred by the doctrine of res judicata, and that evidence at hearing concerning stability of the backfill indicates the NOV should not have been issued by OSM, because SMCRA only requires compaction of fill to insure stability, and does not require compaction "to reduce settlement of backfill material." (SOR at 36.) Finally, it is suggested that Judge Torbett's opinion may have been coerced, inasmuch as, at the conclusion of the hearing before him, he "indicated he agreed with Appolo's position" and was then "reassigned, and stripped of his law clerk staff," whereupon he issued a Decision that "simply cited OSM's brief." (SOR at 2.)

Judge Torbett's Decision does, as Appolo says, find for OSM by adopting attached OSM briefs, which include proposed findings and conclusions, "as the final opinion." (Decision at 2.) It is, nonetheless, clear that Judge Torbett rejected Appolo's arguments in so doing, and adopted the findings proposed by OSM concerning the contested NOV and CO. There is nothing in this method of decisionmaking, of itself, that indicates bias or error.

A discussion between counsel and the Judge following completion of testimony considered whether settlement of fill after reclamation can

violate SMCRA's prohibition against highwalls. It is apparently this exchange that Appolo considers to be his statement of agreement with the Appolo position. The reported discussion includes the observation by Judge Torbett concerning whether highwall elimination must be permanent, "that's the issue I want you to brief because that's the issue that's going to have to be resolved. Regardless of how I decide this case, I feel like it will be resolved." (Tr. at 300.) Other statements concerning his probable future ruling are similarly inconclusive about his intended result, including his recollection that this case is the first of its kind that he has tried (Tr. at 299), and a comment that he may "differ" with both counsel but will apply applicable State and Federal regulations to reach a decision. (Tr. at 301-302.) Neither the nature of the Decision issued by Judge Torbett nor his comments at the close of the evidence indicate that he was improperly motivated by considerations of a personal nature when he ruled as he did, and the suggestion there was improper conduct on the part of the fact finder must be rejected as unsupported in the record.

[1] While this case may have been one of first impression for Judge Torbett, it is not without precedent in the Department, as Appolo acknowledges. The question whether a permittee has satisfied reclamation obligations under SMCRA by temporarily covering a highwall was directly answered in River Processing, Inc. v. OSM, 76 IBLA 129, 141 (1983), when the Board refused to accept the very argument now advanced by Appolo, stating "[w]hile we do not reject the company's assertion that it covered the highwall during its reclamation operations, we do reject its argument that by temporarily covering the highwall it has completely satisfied its obligation 'to eliminate all highwalls.'" On the record before us, this case cannot be distinguished from River Processing; Appolo is correct in asserting that, if this appeal is to succeed, then River Processing must be overruled. We decline to do so, however, and instead affirm Judge Torbett's Decision.

Appolo suggests the River Processing opinion rests on "faulty engineering data and an incorrect interpretation of [SMCRA]." (SOR at 35.) It is said that the "error of the River Processing case is in its assumption that settling of backfilled materials is equivalent to 'instability.'" (SOR at 36.) Arguing that SMCRA requires only so much compaction of filled areas as is needed to insure stability, Appolo concludes that, inasmuch as SMCRA does not require compaction to prevent highwalls, there is no requirement to maintain reclaimed areas free of highwalls resulting from settling backfill.

This argument was first advanced at the hearing by Appolo's chief engineer, who testified that the areas where highwalls had emerged after reclamation were nonetheless properly reclaimed because, while there had been settling of fill material, the fill was not unstable. (Tr. 286-89.) According to Appolo's engineer, stability of the fill was shown by the fact that, while it had settled, none of the backfilled areas exhibited structural deformation indicating the fill was likely to slide. (Tr. 279-83.)

He reasoned that because Appolo had complied with the reclamation regulations by eliminating the highwalls, "[w]e have complied with our permit, and should not be punished for * * * what's not in the regulations." (Tr. 289.)

Nothing in the State or Federal regulations supports this argument; both authorities require complete elimination of highwalls. See 30 C.F.R. § 816.102; 405 K.A.R. § 16:190. These rules govern backfilling and grading and require complete elimination of all highwalls by those means. In so doing, they implement SMCRA section 515(b)(3), 30 U.S.C. § 1265(b)(3) (1994), which requires elimination of "all highwalls." The highwalls at issue were discovered after reclamation of the site during inspections conducted before the sites were finally released from performance bonds insuring completion of required reclamation. Contrary to the suggestion made by Appolo, no loophole exists in the law that will allow an operator to escape compliance with the requirement imposed by State and Federal regulations that highwalls be permanently eliminated. Judge Torbett correctly sustained the NOV and CO, based on his adopted Findings B through F and GG, that Appolo had failed to restore the permit to AOC by removing all highwalls. See River Processing, *supra*, and authorities cited therein.

Rejection of this principal argument on appeal does not entirely decide this appeal; the additional objections to Judge Torbett's ruling have been often considered in past opinions, however, and do not merit extended discussion.

As defined by statute and regulation, AOC means restoration of "the general surface configuration of the land prior to mining [that] blends into and compliments the drainage pattern of the surrounding terrain, with all highwalls * * * eliminated." 30 C.F.R. § 701.5, implementing 30 U.S.C. § 1265(b)(3) (1994). Appolo now argues that OSM was prevented from issuing an NOV to Appolo by state administrative proceedings that ended in 1991 with a finding that Appolo was not required, as a matter of fairness, to eliminate highwalls and return the permitted area to AOC where surface conditions were the result of backfill settlement occurring after highwalls had been eliminated. By ruling as he did, however, the State's hearing officer failed to enforce the state rule requiring highwall elimination. He also failed to make a finding that there was no remaining violation of the law, as he was required to do if his decision were to be dispositive of the highwall issue. Because his ruling failed to deal with the question raised by the existence of alleged violations on the Appolo permit, but simply excused their admitted presence on the permit, the ruling does not provide good cause to explain the State's failure to cite the violation and cannot operate as a bar to the present enforcement action by OSM. W.E. Carter, 116 IBLA 262, 267 (1990). Contrary to an underlying assumption in this argument, OSM has authority, in an oversight capacity in such cases as this, to issue an NOV in Kentucky, notwithstanding that primary regulatory jurisdiction rests with the State, in order to insure that SMCRA standards are properly enforced. Annaco, Inc. v. Hodel, 675 F. Supp. 1052, 1056 (E.D. Ky 1987).

Further, if the doctrine of res judicata were to be applied in this case, as Appolo contends, there must be evidence to support a finding of privity between OSM and the state regulatory agency in the permitting and administrative process at the state level. See Annaco, Inc., *supra*, at 1059. No such evidence is present here, and this argument is rejected.

Freemont Coal Co. v. OSM, 130 IBLA 41, 43 (1994). Principles of res judicata do not apply to OSM's enforcement of SMCRA in cases such as this, where a SMCRA violation remains unresolved by state administrative action.

See R.C.T. Engineering, Inc. v. OSM, 121 IBLA 142, 149 (1991). Judge Torbett correctly found, therefore, in his adopted Finding A, that OSM properly exercised Federal oversight authority pursuant to 30 U.S.C. § 1271(a)(1) and 30 C.F.R. § 843.12 when the NOV and CO were issued to Appolo, because an alleged violation of SMCRA remained to be resolved following State action.

The argument by Appolo that backfill instability was not proven by OSM (and that the NOV should therefore be dismissed) overlooks evidence provided by both OSM and Appolo that scarps and fissures are present in backfill on the permit. Testimony at the hearing established that because such features invite erosion damage by permitting water to enter the fill, their existence indicates an instability in the fill. See Tr. 81, 92-94, 147, 294. The statutory definition of AOC requires that reclamation restore the mined area to blend into and complement the drainage pattern, with all such depressions eliminated. 30 U.S.C. § 1265(b)(3) (1994). Appolo did not produce evidence to explain how depressions formed by the scarps and fissures that were admittedly found on backfill in the permit area can blend into and complement the surrounding terrain. It was incumbent on Appolo to make such a showing if this argument were to prevail. See 30 C.F.R. § 701.5; 405 K.A.R. § 16:050 § 4. Because no proof on the issue was offered, this argument too must be rejected.

Arguments advanced by Appolo concerning rules applicable to interim surface mining permits can have no relevance to this case, which did not involve such a permit. And while Appolo alleges OSM acted improperly in rejecting a State response to a notice from OSM of possible violations on the Appolo permit (10-day notice), including highwalls and scarps left on the Appolo permit, a permittee-operator lacks standing to challenge the conduct of this exchange between the Federal and State regulatory authorities. See 44 Fed. Reg. 14902, 15305 (Mar. 13, 1979); 53 Fed. Reg. 26728, 26742 (July 14, 1988); Harlan Cumberland Coal Co. v. OSM, 123 IBLA 129, 134 (1992). Arguments addressed to alleged deficiencies in the 10-day notices given by OSM to the State must therefore be rejected as well. Finally, a suggestion that the State regulatory authority may adopt backfill policies allowing tolerance of small amounts of settlement is misplaced in this case where backfill settlement exposed 15-foot highwalls, a variance exceeding the minimal allowances described by Appolo.

In order to grant the relief sought by Appolo in this appeal, we should need to overrule more cases than River Processing: The opinions in W.E. Carter, Freemont Coal Co., R.C.T. Engineering, and Harlan Cumberland

Coal Co., supra, would also be called into question were we to take favorable action on Appolo's appeal, given the circumstances shown to exist on the Appolo permit. We therefore find that Appolo has failed to show error in the Decision here under review and affirm Judge Torbett's Decision, which is consistent with our prior opinions. Any arguments raised by the parties not specifically addressed in this opinion have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge